

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition for Forbearance Under)	
47 U.S.C. Section 160(c) from)	WC Docket No. 05-170
Application of Unbundling Rules that)	
Limit Competitive Alternatives)	

**COMMENTS
OF
GILLETTE GLOBAL NETWORK, INC. D/B/A EUREKA NETWORKS
MCLEODUSA, INC.
MPOWER COMMUNICATIONS CORP.
PACWEST TELECOMM, INC.
TDS METROCOM, LLC
US LEC CORP.**

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Summary

In the *Triennial Review Remand Order*, the Commission adopted a wire center approach to evaluation of loop impairment in light of the requirement under *USTA II* to consider the potential for deployment and because of administrative burdens of a building-specific approach. The Commission nonetheless recognized that a wire center approach was imprecise and would result in a finding that CLECs were unimpaired for all buildings served by a wire center even though CLECs would be unable to serve many buildings for a variety of factors including lack of building access. The Petition that is the subject of this proceeding provides the Commission an opportunity to refine its wire center approach without transgressing *USTA II* or imposing undue administrative burdens.

The proposed forbearance from application of wire center approach to DS1 loop impairment for predominantly residential and small office buildings would not impose administrative burdens because it would apply in part to the same set of buildings that the Commission already identified in the *MDU/FTTH Order* and otherwise to buildings (those with less than four DS3s of ILEC capacity) that are already known to ILECs. The proposed forbearance would not transgress *USTA II* because it addresses the potential for deployment by recognizing that it is never economic for CLECs to construct loops to predominantly residential and small office buildings for all the reasons stated in the Petition.

The Petition also provides the Commission an opportunity to fine tune application of the DS1 transport cap, assuming it is not rescinded entirely on reconsideration of the *Triennial Review Remand Order*. As requested in the Petition, the Commission should forbear from application of the DS1 transport cap to EELs because the cap imposes high economic and

operational barriers on CLECs, and because it conflicts with the Commission's determination that EELs promote competition by permitting CLECs to extend connections to distant customers that they might otherwise be unable to serve. There is no merit to ILEC arguments that the cap is necessary because it prevents CLECs from evading the DS3 transport cap or that it is necessary to assure that CLECs will efficiently order transport.

The Commission should forbear from application of EEL criteria, assuming that the Commission does not eliminate them on reconsideration of the *Triennial Review Remand Order*. BOC concerns about IXC evasion of special access have no validity in light of BOC long distance market shares and of the proposed acquisitions of AT&T and MCI. The EEL criteria are also obsolete in light of IP-enabled services. BOCs would loudly complain if the Commission imposed network "architectural" requirements on them, and the Commission should repeal application of such standards to CLECs. The EEL criteria are also unlawful because the ban on IXCs using UNEs that supposedly justifies the EEL standards is itself unlawful because the Commission established the ban without an impairment analysis, much less a granular one as required by *USTA I*.

The Commission should promptly grant the Petition.

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Gillette Global Network, Inc. d/b/a Eureka Networks; McLeodUSA, Inc.; Mpower Communications Corp.; PacWest Telecomm, Inc.; TDS Metrocom, LLC; and US LEC Corp. (collectively “Commenters”), by their undersigned counsel, submit these comments in support of the above-captioned petition for forbearance (“Petition”) filed by XO Communications, Inc., Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Eschelon Telecom, Inc., NuVox Communications, Inc., SNiP LiNK LLC, and Xspedius Communications.¹

¹ *Pleading Cycle Established for Comments on Petition for Forbearance of XO Communications, Inc., et al*, Public Notice, WC Docket No. 05-170, DA 05-2003, July 13, 2005.

I. THE COMMISSION SHOULD FORBEAR FROM APPLICATION OF A WIRE CENTER IMPAIRMENT APPROACH FOR DS1 UNES SERVING PREDOMINANTLY RESIDENTIAL AND SMALL OFFICE BUILDINGS

In the *TRRO* the Commission recognized that a wire center approach to defining impairment would be imprecise because CLECs would be considered unimpaired for service to all buildings within a wire center serving area despite the fact that CLECs could not feasibly serve many of those buildings over their own facilities because of a lack of building access, among other reasons.² Nonetheless, in the *TRRO* the Commission concluded that *USTA II* required the Commission to adopt a wire center as the appropriate geographic market, rather than a building specific approach, for evaluating impairment because (1) the court rejected a delegation to the states to determine impairment and (2) the Court required the Commission to consider potential competition not just actual competition.³ The Commission selected business line and fiber based collocators in a wire center as generalized, broad proxies for when CLECs might be able to serve buildings at the DS1 level over self-constructed loops.⁴ The Petition now provides the Commission an opportunity for the Commission to examine in more detail some of the over generalized aspects of a wire center approach for loops that are harmful to competition without in any way transgressing *USTA II*.

As pointed out in the Petition, it is clear that CLECs are impaired with respect to predominantly residential and small office buildings even if they might not be impaired with respect

² *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313 and CC Docket No. 01-338, F.C.C. 04-290 (rel. Feb. 4, 2005) (“*Triennial Review Remand Order*” or “*TRRO*”), para. 169.

³ *TRRO* paras 155-156.

⁴ *TRRO* para. 95.

to other buildings served by a wire center. The Commission has found that there is “little evidence of [C]LECs’ ability to self-deploy single DS1 capacity loops and scant evidence of wholesale alternatives for serving customers at the DS1 level,”⁵ and has also found that “competitive deployment of stand-alone DS1 capacity loops is rarely if ever economic.”⁶ Although the Commission determined in the *TRRO* that “competitors are nonetheless able to provide DS1 capacity service using a competitively deployed, higher-capacity facility...”,⁷ there was no evidence in the record that CLECs ever build such higher capacity loops to predominantly residential or small office buildings. In fact, CLECs will never do so because the revenue opportunities are insufficient to justify construction of loops to these buildings. Accordingly, the Commission should revise through forbearance the general application of the wire center approach to predominantly residential and small office buildings as requested in the Petition.

The requested forbearance would only modify application of current rules with respect to “predominantly residential” and “small office” buildings. The requested relief would not modify application of the wire center approach to loop impairment generally. Therefore, this minor modification would not undermine the more general application of the wire center approach, assuming it is otherwise valid.

Nor would the proposed forbearance create significant administrative burdens. The circumstances in which the requested forbearance would apply have already been defined in part by the Commission in connection with forbearance for so-called “FTTH” to predominantly residen-

⁵ *TRRO* para. 325.

⁶ *TRRO* para. 166.

⁷ *TRRO* para. 166

tial multiunit dwellings (“MDUs”).⁸ The proposed forbearance would apply in part to the same set of buildings already identified by the Commission and, therefore, would not impose any additional burdens on carriers or regulators. The Petition proposes to define “small office” buildings as any building with less than four DS3s of total activated ILEC capacity. This information should be readily available to ILECs. Therefore, the proposed forbearance would not impose a significant administrative burden in this regard either.

The proposed forbearance would also permit the Commission partially to address the impact of the SBC/AT&T and Verizon/MCI mergers on the Commission’s impairment analysis in the *TRRO*. In the *Triennial Review Remand Order* the Commission found that CLECs were impaired in part because of economies of scale, first-mover advantages, absolute cost advantages, and barriers within the control of the ILEC.⁹ These advantages of the ILEC would be enhanced by the proposed mergers and would exacerbate CLEC impairment, because, according to SBC, its merger with AT&T will save \$15 billion dollars,¹⁰ a savings increase that no CLEC could duplicate. This is especially true with respect to obtaining DS1 access to predominantly

⁸ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, FCC 04-191, released August 9, 2004, para. 5.

⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 17035, para. 84 (2003), (“TRO”), *corrected by* Errata, 18 FCC Rcd 19020 (2003, *vacated and remanded in part, affirmed in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir 2004) cert. denied, 125 S. Ct. 313, 316, 345 (2004).

¹⁰ Witte & Noguchi, at E01 (Feb. 1, 2005) (“Combining Operations should save the companies more than \$15 billion, as they merge networks and personnel”); SBC Press Release, <http://sbc.merger-news.com/materials/am.html>.

residential and small office buildings, where there are insufficient revenue opportunities to permit CLECs to construct their own loops. Accordingly, the Commission should grant the requested forbearance to address the increased impairment that would be caused by the mergers.

Finally, the proposed forbearance could be undertaken with confidence as to lawfulness under the statute because *USTA II* did not address forbearance. *USTA II* elucidated impairment standards under Section 251(d)(2), not forbearance under Section 10(c). Therefore, the Commission may craft a forbearance decision that meets the standards of Section 10(c) that is not unduly, if at all, guided by *USTA II*. The proposed forbearance, nevertheless, would address potential competition by fine tuning application of the rules where there is insufficient revenue opportunity to justify construction of loops by competitors, *i.e.* to predominantly residential and small office buildings. Thus, although not required to do so, the proposed forbearance would fully address *USTA II*'s mandate to consider potential competition. Similarly, as discussed, the proposed forbearance would not impose administrative burdens. Nor would it involve any delegation to the states.

For all these reasons, the Commission should establish the proposed forbearance for DS1 UNEs for service to predominantly residential and small office buildings.

II. THE COMMISSION SHOULD FORBEAR FROM APPLICATION OF THE TEN DS1 CAP PER TRANSPORT ROUTE TO EELS

In the *TRRO*, the Commission limited to ten the number of DS1 circuits that CLECs may obtain on a transport routes “for which we determine that there is no unbundling obligation for DS3 transport”.¹¹ As with application of a wire center approach, the Petition provides the

¹¹ *TRRO* para. 128.

Commission an opportunity to fine tune its application of the DS1 transport cap with respect to EELs, assuming the Commission does not on reconsideration eliminate the cap entirely, as requested by Commenters.¹²

BOCs have argued that the DS1 transport cap should apply when DS1s are purchased as part of an EEL because it is more economical and cost effective for CLECs to collocate at the wire center and multiplex DS1s onto DS3 transport facilities when the CLEC has more than 10 customers being served from that wire center.¹³ This argument is without merit, first, because, if correct, there is no practical need for the cap. CLECs would not order more than 10 DS1s per route if it is inefficient to do so.

Further, there is little risk, as also feared by BOCs,¹⁴ that CLECs would evade the 12 DS3 cap per transport route by ordering hundreds of DS1 transport UNEs over a single route. The installation and non-recurring charges for obtaining many separate DS1 circuits as well as inventory management and fewer points of network failure make it more efficient for CLECs to order DS3 transport, even as special access. Thus, the Commission can, and should, rely on market forces, rather than a cap, to assure that CLECs efficiently order DS1 UNE transport.

Moreover, the cap imposes extremely high economic and operational barriers on CLECs. When they cannot obtain a DS1 transport UNE as part of an EEL, CLECs must seek to get

¹² Petition for Reconsideration filed by CTC Communications Corp., et al, WC Docket No. 04-313, March 28, 2005, p. 23.

¹³ Verizon at 22, SBC at 13-14; BellSouth at 21; Qwest at 2-4.

¹⁴ Opposition to Petition for Reconsideration filed by Verizon, WC Docket No. 04-313, June 6, 2005.

different providers to combine separate loop and transport facilities in a manner to produce a substitute to the ILEC's UNE DS1 EEL offering. Among the economic and operational costs imposed on CLECs by this process are the inability to obtain reasonable and timely cross connects between the loop and transport facilities as well as customer unwillingness to accept the delays and uncertainty associated with provisioning basic DS1 facilities provisioned through two alternative wholesale providers.¹⁵

In addition, the DS1 transport cap conflicts with the cap of 10 DS1 loops serving a single building, which accommodates connection of multiple DS1 loops to a wire center, and hence EELs as well.¹⁶ In effect, the transport cap effectively limits to ten the number of EELs that CLECs can connect to a wire center. The availability of unbundled DS1 transport should not limit the availability of a DS1 EEL. As the Commission has recognized, a DS1 EEL "extends the geographic reach for competitive LECs because EELs enable requesting carriers to serve customers by extending a customer's loop from the end office serving that customer to a different end office in which the competitive LEC is already located."¹⁷ Because of this, a carrier's ability to recoup the costs of a DS1 EEL depends solely on the revenue from the single customer served by that EEL.¹⁸ Thus, DS1 transport when used to extend the reach of a DS1 loop shares the same economic hardship characteristics as a loop and carriers are, at a minimum, equally or more impaired without access to DS1 EELs as they are without access to stand-alone

¹⁵ TRO, paras. 303-304.

¹⁶ 47 C.F.R. Section 51.319(a)(4)(ii).

¹⁷ TRO, para. 576.

¹⁸ TRO, para. 206.

DS1 loops.¹⁹ Thus, the DS1 transport cap, even if it were generally valid, places significant limitations on the ability of CLECs to use EELs and thus is inconsistent with the Commission's finding that EELs are efficient network arrangements which allow CLECs to serve customers which they may otherwise be unable to serve.

Therefore, the Commission should grant the requested forbearance from application of the 10 DS1 transport cap so that CLECs may effectively use EELs as the Commission intended.

III. THE COMMISSION SHOULD FORBEAR FROM APPLICATION OF ELIGIBILITY CRITERIA TO EELS

If the Commission does not on reconsideration of the *TRRO* rescind EEL criteria as requested by Commenters,²⁰ the Commission should grant the requested forbearance because the EEL eligibility criteria are unnecessary and unlawful. First, if BOC concerns about the "evasion" of special access by IXCs ever had any substance, they are invalid today. SBC and Verizon propose to acquire the very IXCs they thought posed the greatest risk of substituting UNEs for special access. As affiliates of BOCs, it is very unlikely that AT&T or MCI would do so in-region or in the service territory of other BOCs. Moreover, BOCs have gained substantial in-region market shares for long distance service. This reduces any concerns regarding evasion of special access in direct proportion to the BOC's market share. There is no risk of "evasion" of the BOC's special access with respect to its own long distance service. Overall,

¹⁹ *TRO*, para. 206.

²⁰ Petition for Reconsideration filed by CTC Communications Corp. et al, WC Docket No. 04-313, March 28, 2005, p. 8. As requested in Commenters petition for reconsideration of the *TRRO*, if the Commission erroneously retains the EEL restrictions, it should establish a carve-out for local data services that would permit, as an alternative to existing restrictions, a CLEC to obtain the EEL if it certifies that it will use the EEL in part to provide local data service.

taking into account both the mergers and BOCs' market share, EEL restrictions serve no useful purpose and the risk of "evasion" of special access is now essentially nil.

On the other hand, the EEL restrictions are very harmful to CLECs because they do not very well accommodate data services. Although BOCs state that the current EEL restrictions focus on voice service, as if that were a justification for them, that is precisely one of the problems with the Commission's "architectural safeguards." Those standards were designed to prevent IXCs from using UNEs to provide voice service but they hinder CLECs' ability to provide local data services as well.

In particular, the EEL architectural standards are obsolete because of VOIP. VOIP is a voice service that has been packetized like a data service. The current EEL restrictions will preclude CLECs from full participation in the IP revolution if they are saddled with these bureaucratic restrictions such as trunk ratios, which are imposed due to the BOCs' obsolete concerns about IXC evasion of special access. Further, the Commission has declared VOIP to be an *interstate* service²¹ while the "architectural standards" require a network structure intended to assure that EELs are used for some *local* voice service. Although EEL restrictions are, therefore, nonsensical in an IP environment, BOCs will try to apply them there. The EEL restrictions also hinder CLECs' ability to provide a host of other useful local data services that CLECs could provide but for the EEL restrictions. While the Commission is ostensibly attempting to encourage the development of broadband services, continuing to apply the EEL restrictions to CLECs will have the opposite result and/or simply foreclose CLEC participation in the broad-

²¹ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Service Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).

band market. BOCs, of course, would be the first to complain about the Commission imposing network architecture requirements on them. The BOCs have no problem, however, with imposing these artificial restrictions on CLECs, especially since they provide the added benefit to BOCs of hindering CLEC participation in the IP-enabled marketplace.

The Commission should also grant forbearance because the prohibition in the *Triennial Review Remand Order* on the use of UNEs exclusively for long distance service is very likely unlawful. In *USTA II*, the Court correctly found that UNEs may be used for any telecommunications service and that the statute requires the Commission to subject all telecommunications services to an unbundling analysis.²² However, in the *Triennial Review Remand Order* the Commission dispensed with any impairment analysis for long distance service and based on a cost-benefit analysis simply prohibited the use of UNEs exclusively for long distance service based on a cost benefit analysis.²³ The Commission established the prohibition without any impairment analysis at all, instead relying on its “at a minimum” authority.²⁴ This flatly conflicts with the direction of *USTA II* that the Commission conduct a service specific impairment analysis for all network elements. If the Commission had done so, it would necessarily have found that IXC are impaired in the same situations as CLECs. While *USTA II* states that it expected the Commission to find that CLECs were not impaired for long distance service, this did not authorize the Commission to dispense with an impairment analysis entirely. Although *USTA II* approved the Commission’s use of “at a minimum” in the context of establishing broadband

²² *TRRO*, para. 31.

²³ *TRRO* para. 37.

²⁴ *TRRO* para. 36.

relief, in that case the Commission considered impairment in addition to its broadband goals. (Nor was the sweeping determination that long distance service is “sufficiently competitive” a granular determination as required under *USTA I.*) In effect, in the *Triennial Review Remand Order*, the Commission has simply reestablished the previous qualifying services standard by a new unlawful means. Accordingly, apart from the fact that there is no need for them, the EEL restrictions are also unlawful because the prohibition on long distance service used to justify the restrictions is also unlawful.

Finally, even if the prohibition on use of UNEs exclusively for long distance service were lawful, the Commission should grant forbearance because the Commission may rely on its enforcement authority to enforce its ban, rather than the using the burdensome, obsolete, and harmful EEL restrictions as a prophylactic measure.

IV. CONCLUSION

For these reasons, the Commission should grant the Petition.

Respectfully submitted,

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